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RELIGION, RELIGIOUS PLURALISM, AND THE RULE OF LAW

SYMPOSIUM INTRODUCTION*

*Mark C. Modak-Truran***

The articles and essays in this Symposium were presented for a Section on Law and Religion panel entitled *Religion, Religious Pluralism, and the Rule of Law* at the 2007 Annual Meeting of the Association of American Law Schools (“AALS”).¹ Part of the panel description helps illuminate the focus of the articles and papers included in this Symposium:

Popular debate about the relationship between law and religion appears to be dominated by two camps – religionists and secularists. Religionists maintain that law ultimately requires a religious foundation which some countries have explicitly embraced in their constitutions and substantive legal norms. In the United States, they urge that government officials recognize this religious foundation by posting the Ten Commandments, displaying crèches, keeping “under God” in the pledge of allegiance, citing scripture in judicial opinions, and allowing prayer and the teaching of intelligent design in public schools. Conversely, secularists embrace the opposite claim that law should have a non-religious foundation. Religion is usually perceived as a threat rather than a source of social solidarity. In France, for example, the doctrine of *laïcité* requires secular solidarity to take priority over religious freedom by prohibiting children from wearing

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1. The Program Committee of the Section on Law and Religion for the 2007 Annual Meeting of the AALS formulated the program description and selected the outstanding speakers for the panel. As Chair of the Program Committee, I thank the Committee members—Eric R. Claeys, Marie A. Failing, Joel A. Nichols, and John E. Taylor—for their hard work to bring this panel to fruition. I also dedicate this Symposium to the memory of Harold J. Berman, Robert W. Woodruff Professor of Law at Emory University, who passed away November 12, 2007, in New York City. Without Harold Berman’s pioneering work in law and religion, the AALS Section on Law and Religion may not have existed and this Symposium may not have occurred. All of us who work in the field of law and religion owe Professor Berman a great debt both for his extraordinary efforts to establish law and religion as a legitimate field of inquiry and for his tremendous insights regarding the relationship between law and religion. We will miss his gracious presence, but his insights will continue to stimulate our thinking for many years to come.

headscarves or religious symbols in public schools. Although there are positions between these extremes, religionists and secularists dominate the current debate without demonstrating much potential for moving the debate forward.

Perhaps their differences rest on more fundamental disagreements regarding their conceptions of religion, religious pluralism, and the nature and rule of law. What are these presuppositions and where do they come from? Are the presuppositions of religionists and secularists reasonable or justifiable? Are there other possible positions based on different understandings of religion, religious pluralism, and the rule of law? How do conceptions of religion, religious pluralism, and law shape our thinking about the proper role of religion in a pluralistic democratic society?

The panel description aims to move the debate about the relationship between law and religion beyond conflicts between secularists and religionists by focusing attention on presuppositions about religion, religious pluralism, and the rule of law. Focusing on these presuppositions helps get beyond the tendency of most legal scholars, judges, and lawyers to think through the law rather than about the law. In *The Cultural Study of Law: Reconstructing Legal Scholarship*, Paul Kahn refers to the “collapse of the distinction between the subject studying law and the legal practice that is the object of study” as “the central weakness of contemporary [legal] scholarship.”² Kahn points out that contemporary legal theory is often criticized as being “too theoretical” and “too disconnected from the practice of law to be of any interest or use.”³ To the contrary, he argues that “[t]heory has substantially failed to separate itself from practice.” Unlike most academic disciplines, “[t]he legal scholar comes to the study of law already understanding herself as a citizen in law’s republic” and “committed to ‘making law work,’ to improving the legal system of which she is a part.”⁴

This failure to separate legal theory from legal practice, according to Kahn, is analogous to the study of Christianity as a believer or insider. Unlike legal scholars, Kahn argues that scholars of religion began suspending belief in the object of study around the beginning of the twentieth century. Likewise, Kahn maintains that “the scholar of law’s rule should not be asked whether law is the expression of the will of the popular sovereign and thus a form of self-government.”⁵ He concludes that legal scholars should focus on the meaning of the law for the community of those

2. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 7 (1999) (emphasis added).

3. *Id.*

4. *Id.*

5. *Id.* at 2.

believing in its validity rather than determining the validity (or resulting need for reform) of the law itself.⁶

While some would challenge Kahn's characterization of the ability to study religion scientifically as an object,⁷ his argument that law should be treated as an object of study rather than as a foregone commitment appears quite strong. When scholars are arguing to reform the law, thinking through the law can provide some insights even if a fuller account would include thinking about the law. However, thinking about law's relationship to other disciplines requires thinking about the law and about the other discipline in question. In the academic study of religion, scholars utilize many different disciplinary perspectives and methods to analyze different aspects of religion. These methods include historical and comparative analysis, and the perspectives include the anthropology of religion,⁸ sociology of religion,⁹ psychology of religion,¹⁰ history of religions,¹¹ theology,¹² and philosophy of religion.

The articles and essays in this Symposium should greatly aid disclosing key presuppositions of religionists and secularists by thinking about the law (rather than through the law) and by employing other disciplinary perspectives and methods to provide a more sophisticated understanding of law and religion. I will provide a brief summary of each article and essay and indicate the methods or disciplinary perspectives employed by them in their analysis.

6. *Id.* at 2-3.

7. Paul J. Griffiths has argued that religion is "a form of life that seems to those who inhabit it to be comprehensive, incapable of abandonment, and of central importance." PAUL J. GRIFFITHS, *PROBLEMS OF RELIGIOUS DIVERSITY* 7 (2001). Given that religion is comprehensive and incapable of abandonment, Griffiths maintains that attempts to construct a nontheological conception of "'religion' have almost always (perhaps always; I am not aware of any exceptions) proceeded by way of abstraction from explicitly theological (and usually Christian-theological and even more usually Protestant-Christian-theological) such understandings." Paul J. Griffiths, *On the Future of the Study of Religion in the Academy*, 74 J. AM. ACAD. REL. 66, 69 (2006). Contrary to those advocating a "scientific" study of religion like Jonathan Z. Smith, he contends that attempts to escape one's own religious commitments has failed. Griffiths concludes that "the future of the nontheological academic study of religion" is "bleak" and that those pursuing the study of religion should make their central religious commitments clear (e.g., Griffiths identifies his as "Catholic Christian") so that this can be taken into account in their understanding and analysis of religion. *Id.* at 74. *But cf.* JONATHAN Z. SMITH, *RELATING RELIGION: ESSAYS IN THE STUDY OF RELIGION* 161, 174-75 (2004) (rejecting critiques of classification and comparison in religious studies and advocating the use taxonomy or classification as a "form of scientific detection known as the academic study of religion"). *See also* Jonathan Z. Smith, *Religion, Religions, Religious, in CRITICAL TERMS FOR RELIGIOUS STUDIES* 269, 269 (Mark C. Taylor, ed., 1998) (arguing that "'religion' is an anthropological not a theological category")

8. *See, e.g.*, CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 87-141 (1973).

9. *See, e.g.*, EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Joseph Ward Swain trans., 1915); PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (1967).

10. *See, e.g.*, WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* (1982) (Martin E. Marty ed.).

11. *See, e.g.*, MIRCEA ELIADE, *THE SACRED & THE PROFANE: THE NATURE OF RELIGION* (Willard R. Task trans., Harcourt Brace Jovanovich & World, Inc. 1959).

12. *See, e.g.*, PAUL TILLICH, *1 SYSTEMATIC THEOLOGY* (1951). *See also* DAVID TRACY, *PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE* 84 (1987).

While the articles are published in alphabetical order, they can be divided into two subgroups. The first group of articles focuses on analyzing the key presuppositions of secularists and religionists primarily in the American context relating to interpretations of the religion clauses of the First Amendment and President George Washington's religious beliefs. The articles in this group were written by Scott Idleman, Michael Novak and Jana Novak, and Steven Smith. The second group of articles focuses more broadly on how secularist and religionist assumptions impact debates about constitutionalism, religious pluralism, and paradigms of law and religion. This group includes articles by Larry Catá Baker, Robin Lovin, and myself. All of these articles and essays attempt to think about the law (rather than through the law) and employ other disciplinary perspectives and methods to provide a more sophisticated understanding of law and religion.

In his article *The Underlying Causes of Divergent First Amendment Interpretations*, Scott Idleman perceptively explains the varying interpretations of the religion clauses of the First Amendment by identifying "two subsurface variables that meaningfully influence the reading of history and historical documents, the discernment of principles, the interpretation of prior case law, and, ultimately the formulation and application of doctrine."¹³ These variables include "the unconscious associate perception of religion" and "the perceived relationship between the active presence of religion and the vitality of the social and political order."¹⁴ Idleman argues that these variables become even more important given that the Supreme Court has not provided an authoritative or comprehensive definition of religion.¹⁵ Although not persuaded by any of the arguments, Idleman speculates about the possible reasons for this lack of definition including that religion is impossible to define, that defining religion would violate the Establishment Clause, or that the definition of religion may be one thing for the Free Exercise Clause and another thing for the Establishment Clause.¹⁶

Idleman similarly argues that "one's sense of the relationship between religion and government necessarily involves both conscious and unconscious dimensions."¹⁷ These dimensions include "one's own experiences," "one's interpersonal relationships," "one's own foundational belief system or worldview," and others.¹⁸ For example, Idleman contends that "[i]f one begins with a generally positive impression of religion's role in society and politics, then one would be more likely to accept or favor the interaction of religion and government and to protect religious conduct from undue legal

13. Scott C. Idleman, *The Underlying Causes of Divergent First Amendment Interpretations*, 27 MISS. C. L. REV. 65, 66 (2008).

14. *Id.*

15. *Id.* at 71-79.

16. *Id.*

17. *Id.* at 81.

18. *Id.* at 81-83.

interference.”¹⁹ Negative impressions would predictably lead to the opposite result. While not naively optimistic that awareness of these two sub-surface variables “will modify their influence,” Idleman insightfully maintains that “[i]dentifying these variables is certainly a necessary first step . . . to making the interpretive conflicts of the religion clauses less perplexing and perhaps, in time, more reconcilable.”²⁰

In their article *Washington's God: Religion, Liberty, and the Father of Our Country*, Michael Novak and Jana Novak artfully use historical analysis to challenge the conventional classification of George Washington as a deist.²¹ They recognize that there is conflicting evidence regarding whether Washington was Christian, deist, or of some other religious persuasion. The Novaks initially note that strong evidence supports that “George Washington was a leading member of his [Anglican] parish church, serving as a warden or a vestryman over a period of more than fifteen years.”²² Rather than stop there, they analyze Washington’s public prayers and private letters and journals to counter the argument that his church involvement was just a matter of show. Michael and Jana Novak conclude that classifying him as a deist “is flying in the face of a mountain of evidence.”²³

On the other hand, this does not mean that “Washington was quite the explicit and fully orthodox Christian that a few other historians have claimed to see.”²⁴ Washington clearly embraced a strong sense of divine providence as he acknowledged in the opening statements of his Thanksgiving Proclamation of 1789: “Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor.”²⁵ From Washington’s statements, Michael and Jana Novak conclude that “his concept of God was far more biblical than deist,” but that “[h]is official words seem closer to the One God of the Hebrew Prophets and the psalmist than to the Father, Son, and Paraclete of, say, the fourteenth chapter of the Gospel of St. John.”²⁶ Through careful historical analysis including attention to the theological ideas prominent during Washington’s life, Michael and Jana Novak greatly increase our theological understanding of President Washington—the father of our country.

Steven D. Smith’s article *How Is America “Divided by God”?* insightfully uncovers “the fundamental underlying differences in presuppositions that surface in more concrete [American church-state]

19. *Id.* at 83.

20. *Id.* at 87.

21. Michael Novak and Jana Novak, *Washington's God: Religion, Liberty, and the Father of Our Country*, 27 *MISS. C. L. REV.* 103 (2008).

22. *Id.* at 104.

23. *Id.* at 136.

24. *Id.* at 136.

25. *Id.* at 126.

26. *Id.* at 137.

controversies over crosses and curriculum and the like.”²⁷ Rather than accept at face value the frequently offered statistic that about 90 percent of Americans say they “believe in God,” he breaks down this group based on different understandings of the nature of God (e.g., personal or impersonal) and the “existential urgency” with which they believe in God (e.g., tame or strong). His analysis divides subjects roughly into two camps—secularists and strong religionists. Strong religionists “include all of those (whether or not of fundamentalist convictions) who not only believe in God, but who believe in an active, engaged, sort of deity, and for whom this belief is important and plays a large role in their cognitive and active life.”²⁸ However, Smith clarifies that secularists include atheists and agnostics, “tame religionists,” and some “strong religionists.”

Smith then persuasively uses this more nuanced understanding of these categories to explain contemporary positions on Establishment Clause issues. For example, he maintains that an overlapping consensus among atheists and agnostics, “tame religionists,” and some strong religionists explains the widespread acceptance of the constitutional doctrine requiring that government action have “a ‘secular’ purpose and a primarily ‘secular’ effect.”²⁹ He explains that “secular” means different things for each constituency. Atheists and agnostics favor secularity for obvious reasons. Alternatively, tame religionists embrace secularity because they view god as detached and “irrelevant to practical concerns (and therefore of no relevance to the practical concerns of politics and government)” or “believe in a biblical God but feel no real urgency or existential commitment.”³⁰ Finally, the strong religionists who support secularity include those who favor a secular sphere on religious grounds like the “Roger Williams-type strong believers whose ‘two kingdoms’ conception is one of marked discontinuity between realms.”³¹ Although somewhat ambivalent about whether clearer understanding about underlying presuppositions will foster greater respect among secularists and strong religionists, Smith rightly concludes that “our best bet is to cultivate a respectful though not dishonest or intellectually soft toleration among fundamentally different worldviews.”³²

Larry Catá Baker’s article entitled *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*³³ utilizes a comparative method of analysis. He keenly discerns the implications of the rise of theocratic transnational constitutionalism in Iran, Iraq,

27. Steven D. Smith, *How Is America “Divided by God”?*, 27 MISS. C. L. REV. 139 (2008).

28. *Id.* at 145.

29. *Id.* at 147.

30. *Id.* at 148.

31. *Id.* at 148.

32. *Id.* at 154.

33. Larry Catá Baker, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISS. C. L. REV. 11 (2008).

and Afghanistan for the post-World War II secular transnational constitutionalism embraced by most constitutional governments and for the national constitutionalism embraced by China and the United States (i.e., the rejection of international legal norms as limitations on state power). Backer argues that “[a]t the end of the 20th century, members of the elite global constitutional law academic community” assumed that “a world order in which the idea of a single transcendent system of supra-national, that is of transnational, constitutionalism” constituted “the great norm of all legitimate national constitutionalism.”³⁴

Contrary to these assumptions, Backer contends that the rise of theocratic transnational constitutionalism in Iran, Iraq, and Afghanistan signals an under-appreciated contest between theocratic and secular constitutionalism regarding which universal substantive values—religious or secular—should limit provisions of national constitutions. Backer maintains that this competition may have several important consequences such as redefining “the scope of protection of religious minorities” and providing “a basis for rethinking the substantive basis of old constitutional orders.”³⁵ With respect to the later, Backer points out the irony that the United States, which was instrumental in facilitating the theocratic transnational constitutionalism in Afghanistan and Iraq, may see the transplantation of theocratic transnational constitutionalism back to the United States given the calls to “recover its roots as a religious state with a plural but common grounding in Christianity.”³⁶ Moreover, Backer’s article contributes to a more sophisticated understanding of the relationship between law and religion by going beyond the assumed normativity of secular transnational or national constitutionalism and recognizing the importance of religion for understanding the recent rise of theocratic transnational constitutionalism.

In his article *Religion and Religious Pluralism*, Robin Lovin astutely identifies the Protestant theological roots of normative religious pluralism that have been generally overlooked in political and legal theory.³⁷ Lovin argues that to understand the “normative religious pluralism” that characterizes American religious life requires “moving beyond the distinctively American experience of religious pluralism to a more general political pluralism that develops alongside the emergence of the modern state itself.”³⁸ In particular, he maintains that in the West, the “rethinking of politics originated in the Protestant Reformation, so that the necessary political arrangements for the emergence of normative religious pluralism were themselves grounded in religious thought about political life.”³⁹ As a beginning to this rethinking of politics, Lovin emphasizes Luther’s important recognition of “sovereign secular authority” as a separate sphere ordained

34. *Id.* at 16.

35. *Id.* at 61-62.

36. *Id.* at 61.

37. Robin W. Lovin, *Religion and Political Pluralism*, 27 *MISS. C. L. REV.* 89 (2008).

38. *Id.* at 101.

39. *Id.*

by God with its own authority to promote security and order.⁴⁰ Lovin then notes that Protestant, Catholic, and Anglican thought all eventually developed different theologies of political pluralism that recognized the “sovereignty” of separate social spheres relating to religion, government, family, work, and culture.⁴¹ The influential political philosophy of John Locke similarly recognized a separate realm of authority for religion and embraced political pluralism.⁴²

The political pluralism supported by these theological and philosophical arguments created space where religious pluralism could flourish. Normative religious pluralism does not just recognize the fact of religious pluralism. “In normative religious pluralism, religious diversity is encouraged and protected by social practices and sometimes by law.”⁴³ Lovin further emphasizes “[t]hat religious pluralism grew in the space provided by this civic neutrality was thus a consequence of religious commitment to political pluralism that began in the exigencies of Reformation conflict, but became a necessary feature of modern life over a couple of centuries of political experience.”⁴⁴ Lovin concludes that “[r]eligious pluralism becomes normative . . . where religion is supported by political pluralism or finds its own religious reasons to advocate political pluralism.”⁴⁵ Thus, contrary to conventional wisdom about law and religion, Lovin’s historical analysis identifies the theological justification for normative religious pluralism in the West and inverts the common assumption that secular political authority was pragmatically justified as a way to get beyond religious warfare and the inadequacies of religion.

Finally, my article *Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion* attempts to isolate paradigms of law and religion to reveal the “key assumptions about law, religion, and their relationship that are rarely examined because they are reflexively taken for granted.”⁴⁶ I argue that “[t]he secularization of the law represents the most widely-held but least examined assumption of the modern paradigm of law and religion.”⁴⁷ To motivate some critical distance from this assumption, I analyze the origin of the modern paradigm as a reaction to the religious pluralism and wars of religion following the Protestant Reformation in the sixteenth and seventeenth centuries. I also provide a definition of religion and religious pluralism and summarize the conventional assumptions about the secularization of the law.

Despite the widespread acceptance of the modern paradigm, I argue that legal indeterminacy and the ontological gap between legal theory and

40. *Id.* at 94.

41. *Id.* at 97-100.

42. *Id.* at 95.

43. *Id.* at 89.

44. *Id.* at 97.

45. *Id.* at 102.

46. Mark C. Modak-Truran, *Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion*, 27 Miss. C. L. Rev. 155, 222 (2008).

47. *Id.*

legal practice present crises for the modern paradigm. Legal indeterminacy means that strong legal formalism does not maintain the autonomy of law as Max Weber assumed it would. Rather, the secularization of law must now be achieved by a normative theory of law. The main types of liberal and republican normative theories of law under the modern paradigm—represented by John Rawls, Jürgen Habermas, and French secularism—fail, however, “for several of the following reasons: 1) they denied legal indeterminacy; 2) they were incoherent; or 3) they required establishing a comprehensive secularism in violation of the Establishment Clause and a proper understanding of religious pluralism.”⁴⁸ In the Part II of this article, I will attempt to set forth a new constructive postmodern paradigm which maintains that “the text of the law must be explicitly secularized (i.e., no explicit recognition of religion), but at the same time, the law is implicitly legitimated by a plurality of religious foundations. The constructive postmodern paradigm of law and religion thus leads to the *desecularization of the law*.”⁴⁹

All of the articles and essays in this Symposium provide rich insights into presuppositions about law and religion that have not been sufficiently examined in prior debates. Each of these articles and essays attempt to think about the law (rather than through the law) and employ other disciplinary perspectives and methods to provide a more sophisticated understanding of law’s relationship to religion. Our hope is that they advance the conversation about law and religion in ways that provide for new avenues of reflection.

48. *Id.* at 202.

49. *Id.* at 162.